In *Scheidler v. NOW*, 537 U.S. 393 (2003), this Court rejected the claim that anti-abortion activists should be held liable under RICO for massive damages and be subject to a nationwide injunction on the theory that their protest activity was "extortion" under the Hobbs Act. The Court concluded: "Because all of the predicate acts supporting the jury's finding of a RICO violation must be reversed, the judgment that petitioners violated RICO must also be reversed. Without an underlying RICO violation, the injunction issued by the District Court must necessarily be vacated." *Id.* at 411.

On remand, the Court of Appeals for the Seventh Circuit found a way to preserve the result the Court had clearly reversed, and remanded to the district court to determine whether the injunction should be continued because of a novel view that the words "by robbery and extortion" in the Hobbs Act do not really refer to robbery or extortion, but to free-floating threats of violence. 91 Fed. Appx. 510. Once again, this Court granted certiorari and conducted full review of this issue, resolving it unanimously in favor of the petitioners. *Scheidler v. NOW*, 126 S.Ct. 1264 (Feb. 28, 2006).

In this case the lower court did not ignore the clear meaning of a mandate of this Court, but it refused to consider a motion to reconsider the judgment below in the light of several highly relevant, supervening decisions of this Court. Pet. 9-10, Pet.App.3, 34 (rejecting consideration of supervening decisions of this Court as outside of the mandate from the en banc court and thus "not open for review"). Curiously, the panel even refused to consider a relevant supervening decision of the Ninth Circuit, *United States v. Cassel*, 408 F.3d 622 (9th Cir. 2005) (applying *Virginia v. Black* to threat statute). Pet.14-16.

The panel misread *In re Sanford Fork & Tool Co.*, 160 U.S. 247, 255 (1895), Pet.App.33, to preclude review of this Court's supervening decisions in *Scheidler II* and in *Black*. The predicates for the judgment of the en banc court are irreconcilable with the teaching of this Court on RICO and

the Hobbs Act in the *Scheidler* decisions, with the teaching of this Court on the "constitutionally proscribable sense" of "intimidation" in *Virginia v. Black*, 538 U.S. 343 (2003), and with the teaching of this Court on Article III standing in cases like *Friends of the Earth v. Laidlaw Environmental Services*, 528 U.S. 167 (2000). We address the impact of the *Scheidler* decisions on this case in Part I, the impact of *Virginia v. Black* on this case in Part II, and the impact of *Friends of the Earth* and other standing decisions on this case in Part III.

REASONS FOR GRANTING THE PETITION

I. THIS COURT'S DECISIONS IN *SCHEIDLER V. NOW* REQUIRE DISMISSAL OF THE RICO CLAIM IN THIS CASE.

A. *The statements and expressive acts of petitioners.* Petitioners published three communications at issue in this case.

1. In 1995, on the twenty-second anniversary of this Court's decision in *Roe v. Wade*, ACLA held a news conference at which they introduced a poster that reads: "Guilty of Crimes Against Humanity. Abortion was provided as a choice for East European and Jewish Women by the (Nazi) National Socialist regime, and was prosecuted during the Nuremberg Trials (1945-46) under Allied Control Order No. 10 as a 'war crime.'" The poster then listed the names and addresses or phone numbers of twelve doctors who provide abortion services. And the poster offered a reward of $5,000 "for information leading to arrest, conviction, and revocation of license to practice medicine." L.1 [L. refers to "Lodging," documents attached at the end of the Pet. App.]

2. Later that summer, at a rally outside the old federal courthouse in St. Louis where Dred Scott went to trial in 1850 to gain his freedom, Pet.App.136, ACLA introduced a poster describing respondent Robert Crist as "guilty of crimes against humanity" and offering $500 "to any ACLA organization that successfully persuades Crist to turn from his child killing" through protected activities "within ACLA guidelines," such as writing, picketing, and leafleting. The poster also urged

readers to "ask Crist to turn from killing and injuring women and children to helping and healing those in need." L.2. Other posters of a similar nature urged readers to "please call, write and pray" for an abortion doctor's "repentance, and ask him to stop killing and injuring women and children, and rather use his abilities to help and heal those in need." L.52,53. Two posters identified an abortion clinic in Granite City, Illinois, and one in St. Louis, Missouri—neither of which is a party to this litigation—and urged readers to "come to this place to pray, picket and offer good alternatives to legalized child killing." L.54,55.

3. In 1996, ACLA publicly advocated compiling information about abortion doctors for future Nuremberg-type trials, in the event that America repudiates abortion on demand. L.24. A nonparty to this litigation, Neil Horsley, launched a website called "Nuremberg Files." L.24-42. Pet.App.77. ACLA insisted that its name be withdrawn from the website and has had nothing to do with it ever since. Tr. 1362-65, 2236-60,2282-87,2306,2314.

The en banc opinion made much of the *broad context* of these statements and acts. We explore this theme in greater detail in Part II below. For now, it is enough to note the *immediate context* or setting of all of these events: open public rallies, where the presumption is that speech of this sort is the classic instance of political speech at the very heart of First Amendment protection. Pet.App.149-50. Hence, in his dissent from the en banc opinion, Judge Kozinski characterized the petitioners' statements as "highly charged political rhetoric lying at the core of the First Amendment." Pet.App.136. *See, e.g., New York Times v. Sullivan*, 376 U.S. 254, 270 (1964) ("debate on public issues should be uninhibited, robust, and wide-open"); and see *National Organization for Women v. Scheidler*, 510 U.S. 249, 263 (1994) (Souter, J., concurring) (reversal of summary judgment did not bar First Amendment challenges to particular applications of RICO to protected protest activity).

B. *The Scheidler litigation.* As the *Scheidler* case progressed, the Court did not address the constitutional issue, but focused on statutory interpretation of the Hobbs Act and the RICO Act. Many of the *amici* participated in the *Scheidler* litigation, argued and decided in October Term 2002 and in the current October Term. On both occasions we noted the lack of any statutory basis for applying RICO to social activists, and offered the Court numerous examples from the history of the Nation that makes the application of massive penalties and nationwide permanent injunctions on speech about matters of public concern utterly inconsistent with the struggle for freedom in this country. *See Scheidler v. NOW*, Nos. 01-1118 and 01-1119, Brief Amicus Curiae of Seamless Garment Network et al., 2002 WL 1594370, and *Scheidler v. NOW*, Nos. 04-1244 and 04-1352, Brief Amicus Curiae of Consistent Life et al., 2005 WL 2148531. *See* the brief discussion of historical examples of this sort in Judge Kozinski's opinion for the panel.

As in *Scheidler*, the complaint in this case alleged that the speeches and expressive actions of the petitioners constituted Hobbs Act "extortion" in violation of the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §§ 1961, *et seq.* The district court rejected petitioners' motion for summary judgment and allowed this contention to proceed to trial, despite his judgment that the three communications summarized above did not "contain any expressly or apparently threatening language," Pet.App.307-08, a point on which we comment in Part II below.

The jury was instructed on the Hobbs Act predicates as the only basis for finding liability under RICO. Pet.App.422-28. Liability was imposed upon the petitioners under this RICO theory, and damages were awarded in the amount of $11 million in compensatory damages, trebled under RICO, and $109 million in punitive damages under FACE. Pet.App.81 n.4. The en banc court sustained the judgment obtained under RICO as consistent with the First Amendment, Pet.App.90-

114,119-23, but vacated the award of punitive damages and remanded for reconsideration under *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996). On remand the district court approved the jury awards of punitive damages in full, and denied petitioners' motions for further briefing on supervening precedents of this Court. Pet.App.64-65. The court of appeals vacated the judgment on punitive damages, which in its view "exceed constitutional limits"; and it refused to consider any other issue, including the relevance of supervening opinions of this Court, as "not open for review." Pet. App. 34.

In 2003 this Court noted in *Scheidler II*:

> There is no dispute . . . that petitioners [in *Scheidler*] interfered with, disrupted, and in some instances completely deprived respondents of their ability to exercise their property rights. . . . But even when their acts of interference and disruption achieved their ultimate goal of "shutting down" a clinic that performed abortions, such acts did not constitute extortion because petitioners did not "obtain" respondents' property. Petitioners may have deprived or sought to deprive respondents of their alleged property right of exclusive control of their business assets, but they did not acquire any such property. Petitioners neither pursued nor received "something of value from" respondents that they could exercise, transfer, or sell. *Scheidler v. NOW*, 537 U.S. 393, 403-04, (2003) citing *United States v. Nardello*, 393 U.S. 286, 290 (1969).

In some respects the words and deeds of the protestors in *Scheidler* had much more direct consequences upon the respondents in that case than did the words and deeds of the petitioners in this case upon these respondents. But whatever one makes of the words and expressive acts of the petitioners in the instant case, they emphatically did not pursue or receive "something of value" from the respondent doctors or clinics. Hence, under *Scheidler II* they cannot be made civilly liable for damages for violating the Hobbs Act as a predicate for a RICO violation.

This view of the law was reinforced by the unanimous decision in *Scheidler III*, 126 S.Ct. 1264 (Feb. 28, 2006), which concluded:

> Congress did not intend to create a freestanding physical violence offense in the Hobbs Act. It did intend to forbid acts or threats of physical violence in furtherance of a plan or purpose to engage in what the statute refers to as robbery or extortion (and related attempts or conspiracies). *Id.* at 1274.

Scheidler II and *Scheidler III* unambiguously establish that the liability theory underlying the RICO verdict in this case—and the Hobbs Act instructions given to the jury—are legally invalid, even if the circuit court decisions on this issue at the time of trial uniformly supported both the theory and the instructions. Inexplicably, however, the Ninth Circuit panel on remand refused to apply this Court's unambiguous, supervening precedents to upset the flawed liability judgment in this case. Pet.App.34. This refusal by the Ninth Circuit panel to apply this Court's decision has exactly the same effect—and is no less tolerable—than the Seventh Circuit's actions following remand in *Scheidler II*. Accordingly, this Court should grant, vacate and remand with instructions to dismiss all RICO claims on the binding authority of *Scheidler II* and *Scheidler III*.

II. THIS COURT'S DECISION IN *VIRGINIA V. BLACK* REQUIRES DISMISSAL OF THE FACE CLAIM IN THIS CASE.

A. *The relevance and limits of contextualization.* The court of appeals allowed the prohibition of intentional intimidation in the Freedom of Access to Clinic Entrances Act (FACE), 18 U.S.C. § 248, to be construed in a manner that allows virtually unrestricted use of the "context" of a threat. Pet.App.72-74,90-92,103, 105,109,120. When combined with the tilt of the court of appeals away from a speaker-based understanding of a "true threat" toward a hearer-based understanding of this phenomenon, this development dangerously distorts the

fundamental role of mens rea in criminal law and of causation in civil liability, and invites jurors to impute guilt or liability to defendants through hidden factors that are constitutionally impermissible.

It is a truism of historical method that the meaning of a *text* can be illuminated by understanding its *context*. But the broad latitude given by the court of appeals to "contextualization" stretches the utility of this tool to the breaking point, allowing freedom to find the *text* itself in the surrounding context, even though a speaker has not uttered that text. In this case, this approach means in practical reality that jurors and judges may attribute to petitioners responsibility for foul deeds they never committed (such as the killing of three doctors who provided abortions in the 1990s). As Judge Rymer implicitly acknowledged in her opinion for the en banc panel, the court below allowed "classic protected speech" to be converted into non-protected speech "by a context of violence that includes the *independent action of others*." Pet.App.91 (emphasis added).

Interpretation always occurs in the present moment when a reader construes a text. Memory plays a role, but even the process of remembering is a present activity. In the appellate process, we assemble the relevant constitutional standards and statutory provisions and records of proceedings, and pore over them to answer the questions they present. In this process, as in all acts of understanding, we the readers are the ones engaged in the act of understanding whenever we read a text. But that does not mean that we get to *make up the text* according to what we recall about the times or the context within which it was uttered, or that we may freely substitute eisigesis for exegesis (reading preconceived notions into a text rather than discerning the meaning that lies within a text).

Lawyers and judges make contextual assessments all the time. But too much contextual analysis could bog down the legal process interminably. For example, what is the current context in which this case comes before the Court? Some might identify it as a moment in which the country is engaged

in shooting wars on two fronts, and worry about the potential impact of this case on anti-war protest. Others might situate this case within the context of the post-*Roe v. Wade* era that formed a lively part of the recent confirmation hearings of the Chief Justice and of Justice Alito. Still others might describe the context as a moment in a more general "culture war."[3] At the very least, it may be said that tempers rise when the issue is discussed, and that people become understandably agitated when abortion protest is linked to the killing of doctors.

In this heated atmosphere petitioners' words and deeds understandably generated considerable popular outrage. But speech in our republic must remain free not only for popular speakers, but also for the unpopular. As Judge Berzon noted in her dissent from the en banc opinion:

> If we are not willing to provide stringent First Amendment protection and a fair trial to those with whom we as a society disagree as well as those with whom we agree—as the Supreme Court did when it struck down the convictions of members of the Ku Klux Klan for their racist violence-condoning speech in *Brandenberg*—the First Amendment will become a dead letter. Moreover, the next protest group—which may well be a new civil rights movement or another group eventually vindicated by acceptance of their goals by society at large—will (unless we cease fulfilling our obligation as judges to be evenhanded)[4] be censored according to the rules applied to the last." Pet.App.195.

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[3] *See, e.g.*, James Davidson Hunter, *Culture Wars: The Struggle to Define America* 4, 13, 19, 44, 49-50, 90-92, 162, 170, 218, 226, 253, 271, 285, 297, 305, 322 (1991). If the source for Hunter's catchy title is the *Kulturkampf* of nineteenth-century Germany, then the translation is inexact. Better to say that we are in conflict over deep cultural values. *See, e.g.*, Jimmy Carter, *Our Endangered Values: America's Moral Crisis* 3, 33, 57, 71-76 (2005); and see Robert Wuthnow, *The Struggle for America's Soul: Evangelicals, Liberals, and Secularism* (1989).

[4] *See, e.g., Hill v. Colorado*, 530 U.S. 703, 741-42 (2000) (Scalia, J., dissenting); *Madsen v. Women's Health Center, Inc.*, 512 U.S. 753, 785 (Scalia, concurring in judgment in part and dissenting in part) (danger of

See Brandenburg v. Ohio, 395 U.S. 444 (1969). All of the reviewing judges who have assessed this record are in agreement that under *Brandenburg* this case does not present any incitement to imminent violence that was likely to have flowed from the statements of the petitioners.

This Court roundly repudiated *guilt by association* in *NAACP v. Claiborne Hardware*, 458 U.S. 886, 919 n.56 (1982) (an individual may not be held liable for damages merely by reason of his association with others who committed unlawful acts, but only for unlawful conduct that he himself authorized or incited). As Justice Stevens there explained: "the Court has consistently disapproved governmental action imposing criminal sanctions or denying rights and privileges solely because of a citizen's association with an unpopular organization." *Id.* at 919, citing *Healy v. James*, 408 U.S. 169, 185-86 (1972).

The en banc opinion mentioned *Claiborne Hardware* in passing, distinguishing its authority on the ground that it did not involve a threats statute such as FACE. Pet.App.93. Judges Reinhardt, Kozinski, and Berzon, discussed this precedent extensively, finding it controlling in the instant case. Pet.App.128, 130-31, 135, 137-46, 174, 209-10. *See also* G. Robert Blakey and Brian J. Murray, "Threats, Free Speech, and the Jurisprudence of the Federal Criminal Law," 2002 B.Y.U. L. Rev. 829, 874-91.

The en banc court purported to guard against *guilt by association*, Pet.App.113, but created a far more dangerous legal tool, *guilt by contextualization*. Judge Rymer acknowledged that the communications at issue in this case "do not contain a threat of force on their face." Pet.App.73. But she found it constitutionally permissible to supply the deliberate intent to intimidate "by force or thereat of force" specified by Congress in FACE, 18 U.S.C § 248(a)(1), Pet.App.404, by looking to the

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"ad hoc nullification machine" to push aside application of doctrines of constitutional law to protest against abortion).

"context" of the petitioners' communications (sometimes called the "historical facts," Pet.App.90, or the "entire factual context," Pet.App.105, or the "whole factual context," Pet. App.110). In particular, the court reasoned, it was proper for the jury to view the petitioners' communications in the "context" of the killing of three doctors who performed abortions in the 1990s, *see* note 2 above, even though there can be no legal relation between these deplorable events and petitioners' communications, which were published *after* the acts of violence had already occurred and which were followed by no violence against anyone, including respondents.

Any attempt to contextualize is fraught with difficulty. One person remembers what another forgets. One person cherishes an aspect of the past more than another. One person perceives a context that is unapparent or hidden to another. Hence, the danger of opening wide the gates of "contextualization" is that it invites jurors to bring into their deliberations all sorts of things that might be legally irrelevant or constitutionally impermissible.

In short, it is an assault upon the First Amendment to allow an alleged "threat" in speech that is not only facially non-threatening, but positively advocates—like the posters here—*non-violent* political action. And it is an assault upon core values in federal criminal jurisprudence to allow the process of contextualization to make up the *very text* or the core element of mens rea in a criminal case or liability in a civil case. Guilt or liability by contextualization wrongly assigns liability to A (such as petitioners) for passionate statements made by B and foul deeds committed by C (nonparties unrelated to A and not under the control of A), and then bankrupts and muzzles A for expressing views on a controversial matter for the rest of his life. *See, e.g.*, Blakey and Murray, "Threats, Free Speech, and the Jurisprudence of the Federal Criminal Law," 2002 B.Y.U. L. Rev. 829, 1010-51.

The en banc court also ruled that the *format* of the communications may also determine whether it is protected speech

or a "true threat." In particular, the court suggested that "[t]he true threats analysis turns on the poster pattern . . . . it is the use of the 'wanted-type format' in the context of the poster pattern—poster followed by murder—that constitutes the threat itself." Pet.App.120. It offends common sense, let alone the First Amendment, to hold that the *format* of a communication could turn protected speech on a poster into a "true threat," but that the same words spoken on a *radio broadcast* would be protected. See *United States v. Kelner*, 534 F.2d 1020 (2d Cir. 1976) (First Amendment protects statement over radio that trained people are now on a mission to make sure that Arafat is assassinated). This makes about as much sense as saying that eye color or weight may by itself determine eligibility for food stamps or a driver's license.

B. *Virginia v. Black*. We now turn directly to the issue of "true threats," which we readily acknowledge to be unprotected by the First Amendment. It is easy to understand that the respondent doctors would have felt threatened by the words and expressive acts of the petitioners. But it is quite another thing for the courts to accept this subjective perception of threat as the only legitimate means of determining when a threat is constitutionally "true." As Judge Kozinski correctly observed, "the constitutional question turns on the source of their fear." Pet.App.211. Judge Kozinski concluded: "Unless ACLA threatened that its members would themselves assault the doctors, the First Amendment protects its speech." Pet.App.210; *and see* the extensive discussion of "true threats" by Judge Berzon. Pet.App.154-75.

Judge Rymer concluded that the posters distributed by petitioners constituted a "true threat because, like . . . burning crosses, they connote something they do not literally say, but both the actor and the recipient get the message." Pet. App. 121. When Judge Rymer wrote in this way, she had only the power of analogical reasoning from prior precedents of this Court, such as *Capital Square Review and Advisory Bd. v.*

Pinnette, 515 U.S. 753 (1995) (KKK may display unadorned cross in public square).

Now, however the task of discerning the law must take in to account this Court's analysis of "intimidation" in *Virginia v. Black*, 538 U.S. 343 (2003), that specifically addressed a Virginia statute that criminalizes the burning of a cross with intent to intimidate. In *Black*, this Court sustained the statute on its face, but held that the statute could not make the act of burning a cross prima facie evidence of the crime, and required proof that a speaker means to communicate a serious expression of intent either to commit an act of unlawful violence to a particular individual or group of individuals, or to place a victim in fear of bodily harm or death.

In *United States v. Cassel*, 408 F.3d 622 (9th Cir. 2005), the Ninth Circuit expressly ruled that, in light of *Virginia v. Black*, "speech may be deemed unprotected by the First Amendment as a true threat only upon proof that the *speaker subjectively intended the speech as a threat.*" 408 F. 3d at 633 (emphasis added).

It is utterly impossible to reconcile this specific intent standard with the jury instructions in this case, which expressly reject a specific intent standard. Pet.App.416. Yet on appeal after remand from the en banc court, the panel refused to consider either this Court's explicit teaching in *Black* on the constitutional prescription that must surround a threats statute, or the application of *Black* to the facts in *Cassel*.

Instead, the panel decided that it had no obligation to follow the law of the land announced by this Court unless expressly ordered to do so. Pet.App.34. This view flies in the face of this Court's teaching that the rule of mandate governs the relationship of an appellate court to the trial court, but does not relieve a court of appeals from the duty of correcting its ruling in light of a subsequent relevant ruling by this Court. *United States v. Wells*, 519 U.S. 482, 488 n.4 (1997); *see also Fogel v.Chestnutt*, 668 F. 2d 100, 109 (2d Cir. 1981).

It may be understandable that appellate judges are reluctant to wipe away the products of significant investments of their time, such as the prior en banc opinions. But that concern rings hollow here, for the *Ninth Circuit itself* acknowledged in *Cassel* that *Virginia v. Black* supersedes the en banc majority's "true threats" analysis. Misplaced judicial pride of authorship cannot and should not be permitted to override the need to ensure that justice is done in individual cases, including the obligation to apply the law as declared by this Court. Where, as here, a liability judgment and injunction carry such obvious negative implications for cherished (but fragile) First Amendment rights, there is even less reason to retain such a superseded decision on the books.

Here again, this Court should grant the petition, vacate, and remand with instructions to the panel to dismiss the application of FACE to the petitioners under *Virginia v. Black*.

III. RESPONDENTS' LACK OF STANDING REQUIRES DISMISSAL OF THE CLINICS FROM THIS CASE.

Respondents are two abortion clinics in Portland, Oregon: Planned Parenthood of the Columbia/Willamette, Inc. and Portland Feminist Women's Health Center. Neither of these clinics was mentioned in any of the statements issued by petitioners. L.1-2, 8-42; Pet.App.329. And none of the four physicians-respondents—Robert Crist, M.D.; Warren M. Hern, M.D.; Elizabeth Newhall, M.D.; and James Newhall, M.D.—has any financial relationship (such as employment) with either clinic. Tr.1182, 1994.[5]

For two reasons there is serious doubt as to the jurisdiction of the federal courts over this case. First, the uncontested facts about the respondents stated above suggest that the

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[5] In fact, *amici* Catholic Worker and Greenpeace have a more solid basis for alleging actual, concrete injury to be adjudicated in a federal court than do respondent clinics. *See* Eric Lichtblaum, "F.B.I. Watched Activist Groups, New Files Show," *New York Times*, Dec. 20, 2005.

clinics have not suffered any injury in fact. It is well settled that a plaintiff must allege a grievance that is not abstract, conjectural, or hypothetical, but one that is actual, real, and concrete. *See, e.g., Friends of the Earth v. Laidlaw Environmental Services*, 475 U.S. 167, 180 (2000); *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1991); *Valley Forge Christian College v. Americans United for Separation of Church and State*, 454 U.S. 464, 472 (1982); Laurence Tribe, *American Constitutional Law* 111-29 (2d ed. 1988). As for the timing of the alleged injury, the harm need not have occurred already; it is sufficient that it may be *imminent*. But, as Judge Kozinski correctly observed in his dissent: "Under *Brandenburg*, advocacy can be made illegal if it amounts to incitement. But incitement requires an *immediacy of action* that simply does not exist here, which is doubtless why plaintiffs did not premise their claims on an incitement theory." Pet.App.135-36; see also at 140 (posters "resulted in no *immediate* harm to anyone").

Second, the core of the theory of the en banc court—contextualization that enables jurors to impose liability upon A by virtue of the words or deeds of B—flies in the face of the second standing requirement, that a litigant show that the actions of the defendants *caused* the alleged injury. *Warth v. Seldin*, 422 U.S. 490, 505 (1975) (plaintiffs must establish that "in fact, the asserted injury was the consequence of the defendants' actions"); *Friends of the Earth, supra*, 528 U.S. at 180 (same); *Lujan, supra*, 504 U.S. at 560-61; Tribe, *American Constitutional Law, supra*, 129-34.

The panel dismissed the standing claim without analyzing its merits. It maintained that the issue was "finally settled." Pet.App.32. That view is incorrect factually. The standing issue was raised before the district court, which acknowledged "serious questions concerning each Plaintiff's standing to assert the causes of action in the Complaint," but "declined to resolve this issue at this juncture." Pet.App.362.

and *see* 386-88. The issue was reasserted on remand, but the panel declined to rule on the issue. Pet.App.34.

Article III standing may not be waived: "Standing represents a jurisdictional requirement which remains open to review at all stages of the litigation." *National Organization for Women v. Scheidler*, 510 U.S. 249, 255 (1994); *Bender v. Williamsport Area Sch. Dist.*, 475 U.S. 534 (1986). The panel purported to avoid the standing issue, but the overlooking of a glaring jurisdictional problem is but another example of how we are left in this case with a result in search of a rationale.

In sum, the panel turned a blind eye to the teaching of this Court on the Hobbs Act in *Scheidler*, the constitutional limits for a true threat as clarified in *Black*, and the classic requirement for Article III standing that a plaintiff must have suffered actual, concrete injury caused by the defendant. For these reasons, the court of appeals must be reversed.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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IN THE

Supreme Court of the United States

AMERICAN COALITION OF LIFE ACTIVISTS, ET AL.,

Petitioners,

v.

PLANNED PARENTHOOD OF THE COLUMBIA/WILLAMETTE, INC., ET AL.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF *AMICI CURIAE* VICTORIA KRAEGER AND EDWARD HYATT SUPPORTING PETITIONERS

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I

INTERESTS OF AMICI CURIAE*

Victoria Kraeger

Victoria Kraeger of Port Leyden, New York and her husband have been involved in pro-life activism since the early 1970s, working at fair booths, passing out literature in front of abortion mills, picketing and debating. Mrs. Kraeger was part of Operation Rescue, passively blocking the doors of abortion mills until the Freedom of Access to Clinic Entrances ("FACE") Act forced her and her fellow pro-lifers to stop this peaceful way of saving babies.

Mrs. Kraeger and her pro-life companions were using the same tactics as the defendants-petitioners American Coalition of Life Activists ("ACLA"); they were letting people know which doctors were abortionists. She made posters and flyers naming the abortionists and asked for prayers for them. She sees nothing wrong with letting the public know what their doctor is doing, for it is no different than publicly identifying doctors who are heart surgeons or pediatricians —or doctors who do *not* perform abortions. As a woman, she should have a right to know if a doctor she is about to choose to deliver her baby favors killing babies before birth. She has provided just such information to women who have thanked her for letting them know.

Mrs. Kraeger observes that we live in a society that sells maps to the homes of famous people, publishes internet lists of sex offenders and identifies CEOs of major corporations that are not earth-friendly. She believes, therefore, that the Court of Appeals for the Ninth Circuit unfairly singled out ACLA for punishment for something that other groups of Americans do.

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* Counsel for all parties have consented to the filing of this *amicus* brief. Their consent statements are on file with the Clerk of the Court. No counsel for a party authored this brief in whole or in part. A monetary contribution to the preparation of this brief was made by Keep The Faith of Ramsey, New Jersey.

If the opportunity arose, Mrs. Kraeger would consider naming abortion providers not only in her own area, but in one or more of the Ninth Circuit jurisdictions, but she is frankly hesitant and fearful of doing so considering the potential reach of the Ninth Circuit holding. In her words:

> When I heard about the Ninth Circuit ruling against ACLA, I burned my lists because I was fearful that I could be implicated also. I am shocked that the right to know and our right to free speech is so totally brought to a halt. I still picket with my family and friends at abortion facilities, but we are always worried about the content of our speech and if someone is going to misinterpret what we say.
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> If this case against ACLA remains as it is, I'm concerned that similar cases will be made against other Pro-Lifers and soon, like the babies killed by abortion, we will have no voice at all.

Edward Hyatt

Edward Hyatt of Pendleton, South Carolina had never thought seriously about opposing abortion until the late 1980s, when Operation Rescue began. He had heard remarks about "hard cases," and he had thought that abortion was probably the best way out of a hard situation. Now, however, on programs hosted by Dr. James Dobson and Marlin Maddoux that featured Randall Terry and other pro-life spokesmen, he was hearing the other side, and he knew that abortion for any reason was a sin against God. It was murder.

Mr. Hyatt's first pro-life involvement was attending a big right-to-life rally in Washington, D.C. in April 1990. Then, in January 1991, he attended a "Jericho March" at the local abortion clinic, met key pro-life activists, and has since spent many hours protesting in front of abortion clinics and in abortionists' neighborhoods, giving out literature, carrying signs, showing graphic pictures of aborted babies,

and talking to anyone involved in any way with having an abortion: the boyfriend, the mother, the grandmother. He has attempted to block clinic access to prevent women from making such an awful mistake and so has been arrested. He has been arrested too for showing the graphic pictures simply because, by showing what abortion truly is, they were deemed by some as "offensive."

Mr. Hyatt would consider identifying abortionists by name and picture in states encompassed by the Ninth Circuit, but he is hesitant and fearful of being prosecuted and then being held liable by the same court that held the defendants-petitioners liable.

SUMMARY OF ARGUMENT

As in this case, in which six of the defendants were from outside the Ninth Circuit but were subjected to its long-arm jurisdiction, future cases of this kind are likely to have the true-threat standard enunciated by the Ninth Circuit here applied to persons in other circuits. The above-named *amici curiae* therefore come before this Court representing not only themselves, but countless others across the nation who now are fearful of exercising their First Amendment right of free speech because of that standard.

This Court has spoken of the transcendent value to society of constitutionally-protected expression, and it consequently has specified that one may be found guilty of incitement only if there is a proved, proximately-caused nexus between the speaker's statement and any violent act that may follow and of threatening only if the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence. The Ninth Circuit, by contrast, now has held, in a strange amalgam of incitement law and threat law, that one may be found guilty of issuing a "threat" by dint merely of how his or her speech might be acted upon by some other person—even someone wholly

unknown to the sp[illegible]er. That standard is distinctly at odds with, in particular, the true-threat standard of the Second Circuit, where the *amicus* Victoria Kraeger lives, for in that circuit only unequivocal, unconditional and specific expressions of intention immediately to inflict injury may be punished—threats which are so unambiguous and have such immediacy that they convincingly express an intention of being carried out. This circuit split combined with having the Ninth Circuit standard applied to and thereby chill the free speech of persons across the country demands that this Court grant *certiorari* and then reverse.

ARGUMENT

Because of the long-arm jurisdiction exercised in cases such as this, the Ninth Circuit true-threat standard will be applied to persons exercising their First Amendment rights across the nation. Yet that standard conflicts with other circuits and with precedents of this Court, for even when a speaker controls or acts in concert with no one else, he can be found guilty of issuing a "threat" merely on how his speech might be acted upon by someone else—even someone unknown to the speaker. The burden on speech is intolerable. This Court should grant *certiorari* and reverse.

This Court should grant *certiorari* because of the adverse impact the Ninth Circuit decision has on freedom of speech not only in that circuit, but across the nation. The First Amendment doctrine enunciated by the Ninth Circuit here is most bizarre. Henceforth, every time one contemplates speaking out on a matter of public importance, he or she must keep an eye to the sky and an ear to the ground, looking not only to the content and propriety of one's own statements and behavior, but to the propriety of what other, wholly unrelated persons have done in the past and, what

is more, may do in the future on hearing what one is now about to say. As one of the dissenting Ninth Circuit judges wrote,

> The difference between a true threat and protected expression is this: A true threat warns of violence or other harm that the speaker controls. . . . [S]tatements that are intimidating, even coercive, are protected by the First Amendment, so long as the speaker does not threaten that he, or someone acting in concert with him, will resort to violence if the warning is not heeded. [*Planned Parenthood of the Columbia/Willamette Inc. v. American Coalition of Life Activists*, 290 F. 3d 1058, 1089, 1090 (9th Cir. 2002) (en banc) ("*PPCW V*") (*Kozinski*, J., dissenting).]

Such has always been the law under precedents of this Court, but it no longer is the law in the Ninth Circuit. Nor, for practical purposes given how jurisdiction was laid in this case and likely will be laid in similar future cases, is it any longer the law in any other circuit either.

Now, under this Ninth Circuit precedent, even when a speaker controls or acts in concert with no one else, he or she can be found guilty of issuing a "threat" by dint merely of how his or her speech might be acted upon by some other person—even a person wholly unknown to the speaker. Even more disturbingly, however, because of how jurisdiction was laid in this case and undoubtedly will be laid in future multi-defendant, multi-jurisdictional cases, this doctrinal aberration will not be confined to the Ninth Circuit. Instead, it will inevitably be applied to persons exercising their First Amendment rights in other circuits across the nation. Irrespective of where outside the Ninth Circuit they live, if they protest against abortion providers—or, for that matter, against anyone else on any other hotly-controversial issue—located in a Ninth Circuit jurisdiction, they will be subject to the Ninth Circuit true-threat standard. Indeed, should these *amici* choose to name abortion providers in a

Ninth Circuit jurisdiction, the Ninth Circuit aberration will be applied to them, including the *amicus* Victoria Kraeger of Port Leyden, New York, even though Second Circuit true-threat doctrine is far different and, in deference to decisions of this Court, far more protective of free speech. The chill on free expression thus will be nationwide and can be thawed only through this Court's intervention.

This Court has stressed that, even for kinds of speech that may be proscribed outright, "they are [not] categories of speech entirely invisible to the Constitution. . . ." *R.A.V. v. City of St. Paul*, 505 U.S. 377, 383 (1992). Even fighting words are categorically excluded from First Amendment protection not because of their particular idea, but because they employ a particularly intolerable and socially unnecessary mode of expressing the idea—*whatever* idea it may be. *Id.* at 393. Therefore the mode of expression will be prohibited only if it is beyond question intolerable and unnecessary. *NAACP v. Claiborne Hardware Company*, 458 U.S. 886, 915 (1982) ("The fact that such activity is constitutionally protected . . . imposes a special obligation on this Court to examine critically the basis on which liability was imposed").

"[P]recision of regulation" thus is demanded when supposed "threats" of violence occur in the context of constitutionally-protected activity. *Ibid.* Such precision is particularly required when the speaker is to be held liable not for his own unlawful conduct, but for the unlawful conduct of others. Such liability will be sustained only if: (1) the speaker authorized, directed, or ratified specific tortious activity, (2) his or her speech was likely to incite unlawful conduct occurring within a reasonable time thereafter, or (3) the speech evidenced other specific instructions to carry out violent acts or threats. *Id.* at 927. "[M]ere *advocacy* of the use of force or violence does not remove speech from the protection of the First Amendment." *Id.* at 927. Rather, the advocacy must be "directed to inciting or producing

imminent lawless action and is likely to incite or produce such action." *Ibid.*

If the gravamen of the allegation is incitement to violence, then, incitement may be found only if there is a proved, proximately-caused nexus between the statement and any violent act that may follow. *Id.* at 922, 928. If the gravamen is, by contrast, not incitement but threat, a true threat under constitutional standards must be far more than merely "a kind of very crude offensive method of stating a political opposition. . . ." *Watts v. United States*, 394 U.S. 705, 708 (1969). This Court in *Watts* understood itself as obligated to interpret the statute prohibiting threats against the President

> against the background of a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may include vehement, caustic, and sometimes unpleasantly sharp attacks. . . . [*Ibid.*]

Thus, an anti-war protestor would not be found guilty for having declared to a crowd on the grounds of the Washington Monument, "If they ever make me carry a rifle the first man I want to get in my sights is L.B.J." *Id.* at 706. As outrageous as the statement might have seemed to some, it was in truth nothing more than political hyperbole. *Id.* at 708. As this Court has said more recently, a true threat is a statement in which the speaker means to communicate "a serious expression of an intent to commit an act of unlawful violence" to a particular individual or group of individuals. *Virginia v. Black*, 538 U.S. 343, 359 (2003). As with the cross-burning at issue there, a particular mode of expression need not always be intended to intimidate, but may instead be core political speech, and so it is essential that the statutory provision being applied not be interpreted so as to create an unacceptable risk of the suppression of ideas. *Id.* at 365.

As between these two doctrinal exceptions to First Amendment freedom of expression, it is not entirely clear whether the present case is to be deemed an incitement case or a threat case or some combination of the two. Certainly the notion advanced by the Ninth Circuit—the notion that speakers are to be held responsible for what *others*, totally uninvolved with the speakers themselves, choose to do with what the speakers say—partakes of incitement, though it is incitement adjudicated without the "extreme care" mandated by this Court. *NAACP v. Claiborne Hardware Company*, *supra*, 458 U.S. at 927. Yet however the Ninth Circuit opinion might be categorized, it announces a First Amendment free speech doctrine that is passing strange. Both the Ninth Circuit majority, *PPCW V*, *supra*, 290 F. 3d at 1062, and the Ninth Circuit dissent, *id.* at 1101 (Berzon, J., dissenting), agreed that the posters and files contained no explicit threats—no "serious expression of an intent to commit an act of unlawful violence" to a particular individual or group of individuals. *Virginia v. Black*, *supra*, 538 U.S. at 359. Rather, as Judge Berzon observed:

> The posters and website could not and would not have been proscribed, as "true threats" or otherwise, had there been no (1) history of similar—although not at all identical—publications put out by other people that were followed by murders—by other people, not members of either of the two defendant organizations—of health professionals who performed abortions; and (2) repeated advocacy by these defendants of the proposition that violence against abortion providers can be morally justified, advocacy that all concede was, standing alone, itself protected by the First Amendment. [*Id.* at 1102.]

Judge Berzon then identified the precise question before the Court of Appeals:

> whether that context is sufficient to turn a set of communications that contains speech at the core of the